BANK UTAMA (MALAYSIA) BHD

v.

GKM AMAL BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[COMPANY WINDING-UP NO: D2-28-553-1999]
25 FEBRUARY 2000

COMPANY LAW: *Winding-up - Opposition to petition - Debt, whether disputed - Meaning of disputed debt - Bona fide dispute - Whether judgment establishes absence of bona fide dispute - Whether pending appeal against judgment amounts to bona fide dispute on debt*

COMPANY LAW: *Winding-up - Petition - Advertisement - Petition advertised earlier and longer than 'seven clear days before hearing' - Whether advertisement of petition irregular - Whether prejudice or injustice caused - Whether advertisement invalidated - Companies (Winding-up) Rules 1972, rr. 24, 194*

The instant winding-up petition was based on a summary judgment. The respondent's appeal against the summary judgment had earlier been dismissed and it appealed to the Court of Appeal. There was, however, no stay of execution pending the appeal. Before the instant court, the respondent contended that because its appeal was pending before the Court of Appeal, the debt became disputed and thus could not form the basis of the winding-up petition. The respondent also submitted that the petition had not been advertised in strict compliance with r. 24 of the Companies (Winding-up) Rules 1972 ('the Rules').

Held:

[1] A disputed debt, in the context of a winding-up petition, is a debt in respect of which it is shown, with grounds supported by evidence, that there is a *bona fide* dispute. In this context, a debt is not a disputed debt simply because the debtor maintains that he disputes the debt. A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The summary judgment obtained by the petitioner is good and enforceable unless and until a stay is granted or it is set aside on appeal. The fact that the respondent had lodged an appeal against the summary judgment only meant that it still disputed the debt; it did not establish that the debt was *bona fide* disputed.

[2] Although the petition was, without the direction of the court, advertised earlier and longer than the 'seven clear days before the hearing' required by r. 24 of the Rules, no prejudice or injustice was caused to any party. Therefore, and by virtue of r. 194 of the Rules, this technical irregularity did not invalidate the advertisement. Besides, the longer notice was advantageous to creditors.

[Order accordingly.]

Case(s) referred to:
Solid Kitchen Sdn Bhd v. Regional Development Sdn Bhd [1998] 3 CLJ Supp 409 ***(not foll)***

Legislation referred to:
Companies (Winding-up) Rules 1972, rr. 24, 194

Companies (Winding-up) Rules 1949 [UK], r. 28
Insolvency Rules 1986 [UK], r. 4.11(2)(b)

For the petitioner - Edwin Koh; M/s Raja, Darryl & Loh
For the respondent - Ong Chee Keong; M/s Ong, Manickam & Co

Reported by Alex KC Lee

JUDGMENT

Abdul Aziz Mohamad J:

The following is my decision on the two points raised by learned counsel for the respondents in opposition to this petition.

Rule 24

Rule 24 of the Companies (Winding-up) Rules 1972 requires every petition to be advertised, in the manner laid down, "seven clear days or such longer time as the court may direct before the hearing". It would appear that the advertising must be done exactly seven clear days before the hearing and cannot be done earlier unless the court so directs. I find the rule most unusual. Its purpose is to give to creditors notice of the petition. Statute does not usually, in requiring something to be done, provide for it to be done exactly on a specific day. One might find it being required to be done, for example, not later than a certain date, in which case it may be done earlier than that date; or at least a number of days before a certain date, in which case it may be done earlier than the prescribed number of days. In the case of r. 24, one would expect that the direction of the court will only be necessary if the advertising were to be done for a shorter period of days before the hearing and that no direction of the court will

be necessary if it were to be done earlier than the prescribed number of days because a longer notice would be better for creditors and would not prejudice anybody. I am puzzled as to the reason why r. 24 is drafted in the way that it is. Neither counsel has been able to suggest a reason. It makes me wonder if there has been an error in the thinking, or in the expression of the thinking, behind r. 24.

Counsel's research has revealed that in Australia the time for advertising is not less than fourteen days before the hearing and that in England, under r. 4.11(2)(b) of the Insolvency Rules 1986, it is "not less than seven business days after service of the petition on the company, nor less than seven business days before the day" appointed for the hearing. In England, under r. 28 of the Companies (Winding-up) Rules 1949, it used to be "seven clear days before the hearing", but because there was no provision, such as exists in our r. 24, for the court to direct a longer time, I should think that a longer number of clear days would have been acceptable as a matter of course.

In this case the advertising was, without court direction, done earlier than the seven days. Technically, therefore, it is an irregularity. Since, however, it does not do injustice to anybody and is, on the contrary, beneficial to creditors, I rule that it is an irregularity which, by virtue of r. 194, does not invalidate the advertisement.

The Question Of Dispute

This petition is based on a summary judgment. An appeal against the summary judgment has been dismissed. The respondents have appealed further to the Court of Appeal and the appeal has not been decided. There has been no stay of execution pending appeal. Learned counsel for the respondents submitted that because there is an appeal to the Court of Appeal, the debt is disputed and cannot form the basis for a winding-up petition. He relied on the following pronouncement by Rekhraj J in *Solid Kitchen Sdn Bhd v. Regional Development Sdn Bhd* [1998] 6 MLJ 437 at p. 439 I:

> But where the debt is disputed, as in this case, being a debt on a judgment subject to a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal.

With respect, my understanding of what is meant by a disputed debt in the context of a winding-up petition is that it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a *bona fide* dispute. A debt is not a disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is *bona fide* disputed. The judgment has already established the contrary.

I make orders in terms of para 10(a), (b) and (c) of the petition.